Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services Pursuant to the Telecommunications Act of 1996	)	CC Docket No. 96-146
	)	
Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services, and Toll-free Number Usage	)	CG Docket No. 04-244
	)	
Truth-in-Billing and Billing Format	)	CC Docket No. 98-170
	)	
Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act, Florida Public Service Commission Petition to Initiate Rulemaking to Adopt Additional Safeguards	)	RM-8783
	)	
Application for Review of Advisory Ruling Regarding Directly Dialed Calls to International Information Services	)	ENF-95-20

AT&T REPLY COMMENTS

Pursuant to Section 1.415 of the Commission's rules (47 C.F.R. § 1.415), AT&T Corp. ("AT&T") submits this reply to other parties' comments on the Commission's *NPRM* in this proceeding to review the effectiveness of its rules governing pay-per-call services, related audiotext information services, and toll-free numbers.[1]

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1 *Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services Pursuant to the Telecommunications Act of 1996; Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services, and Toll-free Number Usage; Truth-in-Billing and Billing Format; Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act; Florida Public Service Commission Petition to*

(footnote continued on following page)

AT&T showed in its Comments that the practice of revenue sharing between carriers and information providers ("IPs") is analytically and economically indistinguishable from pay-per-call services in which the consumer is directly charged a premium rate for such services.[2] These revenue sharing arrangements allow information providers to offer audio services using ordinary "1+" telephone dialing sequences, thereby exposing consumers to abuses that the Telephone Disclosure and Disputes Resolution act ("TDDRA")[3] is intended to prevent. First, because these offerings circumvent the use of 900-prefix numbers, consumers are unable to avail themselves of 900 blocking to avoid objectionable content often associated with pay-per-call services.[4] Additionally, consumers are also thereby exposed to the risk of having their telephone service disconnected for nonpayment of charges for calls placed to audiotext services using 1+ dialing sequences -- a risk that they are protected from under TDDRA and the

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Initiate Rulemaking to Adopt Additional Safeguards; Application for Review of Advisory Ruling Regarding Directly Dialed Calls to International Information Services, CC Dockets Nos. 96-146 and 98-170, CG Docket No. 04-244, RM-8783, and ENF-95-20, Notice of Proposed Rulemaking and Memorandum Opinion and Order, FCC 04-162 (rel. July 16, 2004) ("*NPRM*"), 69 F.R. 61,152 (Oct. 15, 2004).

In addition to AT&T's filed comments, comments were filed by Blue Audio, Inc. ("Blue Audio); HFT; the Iowa Utilities Board ("IUB"); Metro One Telecommunications, Inc.; National Association of State Utility Consumer Advocates ("NASUCA"); PaymentOne Corporation; Pilgrim Telephone, Inc. ("Pilgrim"); and the Verizon Telephone Companies ("Verizon").

2 *See* AT&T Comments at 3-4.

3 Pub. L. No. 192-556, 106 Stat. 4181 (1992), *codified at* 47 U.S.C. § 228 ("TDDRA").

4 *See* AT&T Comments at 6 & n. 14, *citing Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services Pursuant to the Telecommunications Act of 1996*, CC Docket No. 96-146, Order and Notice of Proposed Rulemaking, 11 FCC Rcd 14738, 14742(1996) ("*1996 NPRM*") ¶ 11.

Commission's implementing regulations for charges placed to information providers over 900 and toll-free numbers.[5]

Like AT&T, other commenters recognize the pernicious effects on consumer welfare of revenue sharing arrangements that are used to skirt these critical consumer welfare protections. For example, NASUCA notes that pursuant to TDDRA "pay-per-call services that are not presubscribed or paid for by credit cards may only be offered through telephone numbers beginning with a 900 service access code. Despite this provision, there are thousands of pay-per-call services that are provided outside this pay-per-call setting."[6] NASUCA recognizes that such evasion of the statutory framework is fostered by revenue sharing between IPs and carriers, and states "it is possible and appropriate to find that any revenue sharing arrangement does not comply with Section 228."[7]

The comments also recognize that revenue sharing has also resulted in additional related unscrupulous practices by information providers. One such abuse identified in the *NPRM* is "modem hijacking," in which an unsuspecting Internet user who has downloaded certain software programs is disconnected from the Internet and their telephone line is then used without authorization to place an international call. The foreign carriers over whose lines those calls are terminated -- typically in destinations with higher than average settlement rates -- then share with the information provider a

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5 *See* 47 U.S.C. § 228(c)(4); 47 C.F.R. § 64.1507.

6 NASUCA at 11 (footnotes omitted).

7 *Id.* at 18.

portion of the revenues that the foreign entity obtains through the settlements process with domestic carriers.[8]

Commenters recognize revenue sharing between the foreign carrier and information provider is the *sine qua non* for such schemes. In particular, Verizon succinctly describes the economic underpinnings that make modem hijacking a profitable activity for dishonest IPs and overseas carriers acting in concert with those entities:

> "The scam operators profit by teaming with the terminating foreign carrier in these locations. The terminating foreign carrier charges Verizon or the carrier whose services Verizon resells the international settlement rate to terminate those calls, and then shares a portion of the resulting revenues with the scam operator."[9]

Predictably, the only support among commenters for revenue sharing arrangements comes from entities that are engaged in that practice of offering information services purportedly outside the scope of TDDRA. These parties make no secret of their reliance on revenue sharing; to the contrary, they boldly proclaim their success in propagating such arrangements with local carriers over whose facilities their traffic is completed. Blue Audio, for example, expressly states that it "receives millions of minutes in traffic per day" and that it "derives it revenues solely through contracts with [t]erminating [c]arriers" that agree to pay this commenter a portion of their access

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8 *See NPRM*, ¶ 17. TDDRA is applicable to interstate communications, but the Commission has plenary jurisdiction under the Communications Act over foreign communications and has ample authority under Section 201(b) to regulate activities such as modem hijacking that clearly constitute unjust and unreasonable practices.

9 Verizon at 3 (footnote omitted). *See also* NASUCA at 12 (noting that modem hijacking circumvents customers' ability to avoid charges through 900 blocking and that disconnection of local and/or long distance service can occur for non-payment of calls routed to international calling destinations through modem hijacking); IUB at 1 (same).

revenues from long distance carriers over whose networks such traffic is originated.[10] These parties also make no effort to claim that their provision of audiotext offerings in this manner does not subvert the consumer protection measures that TDDRA was intended to provide, but instead contend that subsequent developments in the marketplace have rendered these safeguards unnecessary. Thus, Pilgrim asserts that "too much emphasis has been placed on the presumed benefits of 900 number blocking" and that "the benefit of 900 number blocking has been rendered irrelevant due to migration of information services to alternate platforms," including in particular the provision of offerings over POTS numbers that is directly in issue in this rulemaking.[11] In like manner, HFT contends that because fewer carriers now offer 900 transport services, leading to a reduction of call volumes placed using the 900 dialing prefix, "900 is a dead issue" insofar as the continuing force and effect of TDDRA is concerned.[12] The short and dispositive answer to these claims is that none of these parties is free to substitute its own self-interested cost-benefit analysis for the balance between private commercial objectives and the public interest that Congress struck in enacting Section 228.[13]

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10 Blue Audio at 2-3.

11 Pilgrim at 16.

12 HFT at 10.

13 For this reason, the Commission should accord no weight to Blue Audio's claims that compliance with the requirement that it preclude the offering of audiotext programming over POTS numbers "would force Blue Audio and similarly situated small businesses out of the market" and that compliance would require such entities to "implement[] a cost prohibitive billing mechanism." Blue Audio at 2. Such arguments are simply irrelevant once it is determined that such offerings over ordinary telephone numbers are prohibited by TDDRA. It is likewise irrelevant whether, as these entities also claim, some consumers may find it acceptable and convenient to access audiotext programming using POTS dialing. *See, e.g.,* Blue Audio at 9; HFT at 12. TDDRA reflects a determination

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Beyond their impermissible attacks about the continuing vitality of the TDDRA statute, these commenters raise two principal arguments against the application of Section 228 to the provision of their offerings over POTS dialing sequences. First, Blue Audio asserts that such regulation would "result in the loss of an avenue of expression for consumers to engage in . . . speech" using its "free" information offerings, and that regulation having such a chilling effect is therefore barred by the First Amendment.[14] Blue Audio supports this argument with decisions involving regulation of cable television, in which a heightened standard of First Amendment scrutiny is applicable and courts require that "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance" of an important or substantial governmental interest.[15] But this more stringent standard is inapposite where, as here, "commercial speech" is at issue. In this context, the test is not whether the regulation, as applied, represents the "least restrictive means" available, but merely whether it has been "narrowly tailored" to serve the government's interest without ensnaring protected, non-commercial speech.[16] Plainly there is a vital governmental interest in restricting the provision of pay-per-call services over ordinary POTS dialing sequences to allow

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that pay-per-call services subject to that statute must be offered in accordance with the protective measures mandated by Congress to avoid inflicting abuses on other unwary consumers.

14 Blue Audio at 7-9.

15 *See id.*, *quoting Turner Broadcasting System v. FCC*, 512 U.S. 622, 662 (1994).

16 *See Board of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989). *See also Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980); *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 43-44 (D.C. Cir. 1985).

consumers to avail themselves of mandatory 900 blocking and to avoid potential disconnection of telephone service for charges on calls placed to those services over these dialing sequences. It is equally apparent that such regulation is tailored to effectuate that regulatory purpose without ensnaring any protected speech, which may continue to be offered using the dialing sequences mandated under the TDDRA statute for pay-per-call offerings.

The other claim raised in these comments is that calls placed using ordinary POTS dialing sequences do not fall within the definition of pay-per-call services, because consumers do not incur an incremental charge in addition to ordinary calling rates, and that these offerings thus cannot be made subject to TDDRA and the Commission's implementing regulations.[17] As AT&T has already shown, these arguments simply blink reality.[18] The compensation that an IP receives through revenue sharing arrangements with a carrier (be it a domestic interexchange carrier, a foreign carrier, or an incumbent or competitive domestic local exchange carrier) is simply a kickback. As the Common Carrier Bureau correctly concluded in its 1995 *Marlowe Ruling*,[19] in such a "sham" two-step revenue sharing arrangement "the consumer has, in

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17 *See, e.g.*, Blue Audio at 4-5; HFT at 8; Pilgrim at 36-37.

18 *See* AT&T Comments filed November 15, 2004 at 8; *see also* Further Comments of AT&T in CC Docket No 96-146, filed May 12, 2003, at 5-6; Further Reply Comments of AT&T in *id.*, filed May 27, 2003, 3-4.

19 *Ronald J. Marlowe*, Esq., DA 95-1905, 10 FCC Rcd 10,945 (Com. Car. Bur. 1995) ("*Marlowe Ruling*").

fact, paid the carrier for transport and the [information] provider, albeit indirectly, for the information."[20]

Unable to credibly dispute this economic reality, commenters that support revenue sharing instead misleadingly claim that the *Marlowe Ruling*'s conclusion cited above was somehow repudiated by the Commission in its 2001 decision in *AT&T v. Jefferson Telephone Co.*[21] AT&T showed in its Comments that this claim fundamentally distorts the Commission's holding in *Jefferson Telephone,* which the *NPRM* itself acknowledges did "not address[] the application of [S]ection 228" to revenue sharing between an IP and a carrier.[22] NASUCA likewise points out that *Jefferson Telephone* did nothing to displace the Common Carrier Bureau's conclusion that such revenue sharing arrangements are irreconcilable with TDDRA. As NASUCA notes, in *Jefferson Telephon*e, the Commission stated that "we emphasize the narrowness of our holding in this proceeding," which was limited to a finding that revenue sharing by a carrier does not violate its nondiscrimination obligations under Section 202, and that "[w]e express no view" on whether revenue sharing might violate other statutory obligations, including those under TDDRA.[23] NASUCA therefore shows that the decision in *Jefferson Telephone* "should not cause [the Commission] to doubt its earlier holdings, which found that revenue-sharing arrangements do not comply with Section 228 of the

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20 *Id.*, 10 FCC Rcd at 10,946.

21 *See* Blue Audio at 6-7 and Pilgrim at 40-42, *citing AT&T v. Jefferson Telephone Co.*, 16 FCC Rcd 16130 (2001).

22 *See* AT&T Comments at 7, *citing* NPRM ¶ 31 (emphasis supplied).

23 NASUCA at 19, *quoting Jefferson Telephone*, 16 FCC Rcd at 16,137.

Communications Act. *Jefferson* did not address whether Section 228 was violated by the revenue sharing arrangements . . . . Any argument that Jefferson reverses the Commission's earlier holdings should be summarily dismissed."[24]

In addition to finding that revenue sharing arrangements between IPs and carriers are unlawful, the Commission in this proceeding should adopt effective procedures to address this abusive practice. While enforcement action against entities subject to Commission authority is available and should be exercised where appropriate, other measures should also be implemented that will stem this problem at its source. Specifically, long distance carriers that obtain evidence of pay-per-call traffic calls to chat lines, "free" audio conferencing services and similar offerings should be authorized to suspend payment of access charges to local carriers on whose facilities such traffic is terminated, pending identification by the local carrier of all POTS numbers involved in such arrangements, and relieve long distance carriers of the obligation to pay access for calls that are terminated to those numbers.[25] This measure will remove the economic incentives to evade TDDRA through revenue sharing, without the need for expenditure of

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[24] *Id.* at 19-20 (footnote omitted).

[25] Although the Commission in *Total Telecommunications Services, Inc. v. AT&T*, 16 FCC Rcd 5726 (2001) declined to prohibit the local carrier from charging any access fees for calls to a chat line, that decision was expressly premised on the Commission's conclusion that AT&T's counterclaim for such access payments, based on the unlawfulness under TDDRA of the revenue sharing arrangement between the local carrier and its affiliated IP, was somehow "moot." *See id.* at 5745 ¶ 41. However, the Court of Appeals remanded the dismissal of AT&T counterclaim for further consideration by the Commission. *See AT&T Corp. v. FCC*, 317 F.3d 227, 238 (2003). The Commission did not decide that issue then because the remanded complaint was dismissed following a settlement between the parties. *See Total Telecommunications Services, Inc. v. AT&T Corp.*, 18 FCC Rcd 11,533 (2003).

the Commission's scarce administrative resources against the host of unscrupulous pay-per-call providers now operating in the marketplace.

CONCLUSION

For the reasons stated above and in AT&T's prior filings in the above-captioned proceedings, the Commission should

(a) find that any form of remuneration to an entity providing or advertising an information service by a common carrier which charges a telephone subscriber for an interstate call to that information service is *per se* evidence that such an arrangement is definitionally a pay-per-call service under TDDRA and is required to be offered solely in accordance with the requirements of that statute and the Commission's implementing regulations; and

(b) authorize domestic long distance carriers to withhold payment of access charges to local exchange carriers for calls to numbers used for provision of pay-per-call services in violation of TDDRA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Tracy Lea Rudnicki, do hereby certify that on this 29th day of November, 2004, a copy of the foregoing "AT&T Reply Comments" was served by U.S. first class mail, postage prepaid, on the parties listed below.

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